U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 April 2005

In the Matter of:

EVERETT H. BURKE,
Claimant

Case No. 2003-BLA-6217

v.

ADDINGTON, INC.,
Employer

and

ADDINGTON RESOURCES, INC,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Monica Rice Smith, Esq.
Edmond Collett, PSC
Hyden, Kentucky
For the Claimant

Carl Brashear, Esq.
Hoskins Law Offices, PLLC
Lexington, Kentucky
For the Employer

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. The Act and implementing regulations, 20 CFR Parts 410, 718, 725 and

727, provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and regulations define pneumoconiosis, commonly known as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 CFR § 718.201 (2004). In this case, the Claimant, Everett Burke, alleges that he is totally disabled by pneumoconiosis.

I conducted a hearing on this claim on May 18, 2004, in Prestonsburg, Kentucky. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18 (2004). At the hearing, the Claimant was the only witness. Transcript ("Tr.") at 9-46. Director's Exhibits ("DX") 1-32, and Administrative Law Judge Exhibit ("ALJX") 1, were admitted into evidence without objection. Tr. at 6-7, 45. The Claimant and Employer submitted closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits admitted into evidence, the testimony at hearing and the arguments of the parties.

PROCEDURAL HISTORY

The Claimant filed his initial claim on January 6, 1992. DX 1. The claim was denied by the District Director of the Office of Workers' Compensation Programs ("OWCP") on June 23, 1992, on the grounds that the evidence did not show that the Claimant had pneumoconiosis, or that it was caused by coal mine work, or that the Claimant was totally disabled. The Claimant did not appeal that determination. DX 1.

More than one year later, on September 22, 1994, the Claimant filed a duplicate claim. DX 2. The claim was denied by the Director on February 16, 1995, on the same grounds as the previous claim. The Claimant did not appeal that determination either. DX 2.

The Claimant filed his current claim on February 6, 2002. DX 4. The Director issued a proposed Decision and Order denying benefits on April 23, 2003. DX 27. Mr. Burke appealed on April 25, 2003. DX 28. The claim was referred to the Office of Administrative Law Judges for hearing on July 1, 2003. DX 32.

APPLICABLE STANDARDS

This claim relates to a "subsequent" claim filed on February 6, 2002. Because the claim at issue was filed after March 31, 1980, and after January 19, 2001, the effective date of the current regulations, the current regulations at 20 CFR Parts 718 and 725 apply. 20 CFR §§ 718.2 and 725.2 (2004). Pursuant to 20 CFR § 725.309(d) (2004), in order to establish that he is entitled to benefits, Mr. Burke must demonstrate that "one of the applicable conditions of entitlement … has changed since the date upon which the order denying the prior claim became final" such that he now meets the requirements for entitlement to benefits under 20 CFR Part

718. In order to establish entitlement to benefits under Part 718, Mr. Burke must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. 20 CFR §§ 718.1, 718.202, 718.203 and 718.204 (2004). I must consider the new evidence and determine whether Mr. Burke has proved at least one of the elements of entitlement previously decided against him. If so, then I must consider whether all of the evidence establishes that he is entitled to benefits. *Labelle Processing Company v. Swarrow*, 72 F.3d 308 (3rd Cir. 1996); *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994).

ISSUES

The issues contested by the Employer, or the Employer and the Director, are:

1. Whether the claim was timely filed.

2. Whether Mr. Burke is a miner as defined by the Act.

3. Whether he has pneumoconiosis as defined by the Act and the regulations.

4. Whether his pneumoconiosis arose out of coal mine employment.

5. Whether he is totally disabled.

6. Whether his disability is due to pneumoconiosis.

7. The number of his dependents for purposes of augmentation.

8. Whether the named Employer is the Responsible Operator.

9. Whether the evidence establishes that one of the applicable conditions of entitlement has changed pursuant to 20 CFR § 725.309 (2004).

Counsel for the Employer stated he anticipated that the number of dependents and the identity of the responsible operator were issues which could be withdrawn after the Claimant's testimony. The District Director found that Mr. Burke had 11 years of coal mine employment; counsel for the Employer stipulated to 11 years. DX 32; Tr. 5-6. The Employer reserved the right to challenge the District Director's finding that it would be responsible for payment of fees, charges and other expenses incurred by the Claimant in developing the claim. Tr. at 47; DX 30.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and the Claimant's Testimony

Mr. Burke was born in 1939, and was 64 years old at the time of the hearing. He testified that he began, but did not complete the eighth grade. He stated that he has been married to Ruth

Burke for sixteen years. Tr. 10; DX 11. They have no children under the age of eighteen or dependant on them. Tr. 10. Therefore, I find that Claimant has one dependant, his wife Ruth, for purposes of augmentation.

Mr. Burke testified that he began working in the coal mines in 1962 at Daniels Coal Company. He was then employed by various companies for several years following that time. His last coal mine employment was at Addington, Inc., in Ashland, Kentucky. Tr. 24-25; DX 3. Therefore this claim is governed by the law of the Sixth Circuit. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (en banc).

Mr. Burke testified that he left the mines in 1990 because of a heart attack. He stated that currently he is being treated for lymphoma cancer, aneurisms, breathing problems and high blood pressure. Mr. Burke indicated that he has been seeing Dr. Mohammed for about a year for his breathing problems. He "smothers" and has a dry cough. He uses inhalers, and a breathing machine three times a day. His activities are very limited by shortness of breath. He received a lump sum state black lung award and is currently on Social Security disability. Tr. 27-34.

Status as Miner

The 1977 amendments state that the purpose of the Act is to provide benefits, in cooperation with the states, to miners who are totally disabled due to coal workers' pneumoconiosis, and to surviving dependents of miners whose death was due to such disease. 30 U.S.C. § 901(a). Thus, a prerequisite to establishing entitlement to benefits is proving that the claim is on behalf of a coal miner or a survivor of a coal miner. The amended regulations at 20 CFR § 725.101(a)(19) provide:

> Miner or coal miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. § 725.101(a)(19) (2004).

Moreover, the new regulation at 20 CFR § 725.202(a) provides a new rebuttable presumption that certain individuals are miners, as follows:

> (a) Miner defined. A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. *There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner.* This presumption may be rebutted by proof that:

(1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or

(2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

Section 725.202(b) specifically addresses coal transportation workers. The regulation states:

(b) Coal mine construction and transportation workers; special provisions. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. A transportation worker shall be considered a miner to the extent that his or her work is integral to the extraction or preparation of coal....

(1) There shall be a rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of:

(i) Determining whether such individual was or is a miner; ...

(2) The presumption may be rebutted by evidence which demonstrates that:

(i) The individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or

(ii) The individual did not work regularly in or around a coal mine or coal preparation facility.

Mr. Burke testified that he worked in surface coal mines as an equipment operator, and also performed various other jobs at the mines. Tr. at 10-25. Although the Employer contested this issue, it has not presented any evidence or argument to rebut the presumption that Mr. Burke was a miner. Therefore, I find that Mr. Burke was a miner within the meaning of the Act.

Timeliness

Under 20 CFR § 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. 20 CFR § 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. At the hearing, Mr. Burke was not asked whether or when a doctor has told him he is totally disabled due to pneumoconiosis. There is no evidence in the file that Mr. Burke has ever been told that he is totally disabled by pneumoconiosis. At most, it appears that Mr. Burke was told that he should avoid further dust exposure. *See* report by Dr. Bruce Broudy dated January 23, 1995, found in DX 2. This recommendation, in and of itself, however, does not constitute an articulation of disability pursuant to the regulations or case law,

as it does not foreclose comparable work in a dust-free environment. *See Zimmerman v. Director, OWCP*, 871 F2d 564, 567 (6th Cir. 1989). The Employer has offered no evidence or argument on this issue. I find that the claim is timely.

Length of Employment

According to the employment histories the Claimant submitted to the Department of Labor and Social Security records, the Claimant began working in the mines in 1962. He left the mines in 1990. DX 5, 8, 9. During this time, he worked for numerous mining companies and was unsure of the exact dates he worked for each. Using the table from the Bureau of Labor statistics, ALJX1, the miner's social security records and his testimony, I credit him with the following coal mine employment.

The Social Security records indicate that although Mr. Burke began working for Beaver Coal in 1962, he earned only $8.05 that year. In 1963, he earned $140, and in 1964 he earned $632.51 with Beaver, and so I credit him with .05 and .21 years, respectively, for that time. In 1967, 1968 and 1969, the Social Security records indicate full years of coal mine employment, and so I credit him for three years during this time. In 1970, the records indicate that Mr. Burke worked part of the year for Terry Elkhorn and part for Andy T and Franklin Hall Surface Mining for a total income of $3442.78, or .72 years of coal mine employment. The records indicate full years of coal mine employment in 1971 for Bizzak, 1972 for Bizzak and SAARCAR, in 1973 with Bizzak and Bushy Creek, in 1974 for Bushy Creek and Thorn, and in 1975, 1976 and 1977 for Thorn Industries. Accordingly, I credit Claimant with seven years of coal mine employment for this time. In 1979, Mr. Burke worked for Bizzak, Sand Bar and Paul Coffey, and so I credit him with .91 years during this time. In 1980, the records indicate coal mine employment with Bizzak and Paul Coffey for a credit of .29 years. Claimant worked in coal mine employment with Jim Lewis In 1981 for a credit of .55, and for a full year in 1982. In 1987, Mr. Burke began working for Addington, earning $4669.44 in 1987 and $12, 003.62 in 1988 for a credit of .30 and .75 years respectively. The records indicate full years of coal mine employment in 1989 and 1990. Finally, the records show that Claimant earned $2089 in 1991 and I credit him with .12 years of coal mine employment for this year.

In total, I find that Mr. Burke has established 16.9 years of qualifying coal mine employment.

Responsible Operator

The Claimant testified that he worked at Addington, Inc., from 1987 until 1990, when he left because of a heart attack. Tr. at 24-25. The Director found that the Claimant last worked in coal mine employment for Addington as verified by Social Security records and pay stubs. DX 27. The evidence supports the conclusion that the Claimant was a miner last employed by Addington, a mine operator, for approximately three years. There is no evidence that Addington is unable to assume liability in the event the Claimant is found to be eligible for benefits. I find that Addington is the Responsible Operator in this case pursuant to 20 CFR §§ 725.491, 492 and 493 (2004).

Material Change in Conditions

In a subsequent claim, the threshold issue is whether there has been a material change in conditions since the previous claim was denied. The first determination must be whether Mr. Burke has established with new evidence that he suffers from pneumoconiosis or other pulmonary or respiratory impairment significantly related to or aggravated by dust exposure. Absent a finding that he suffers from such an impairment, none of the elements previously decided against him can be established, and his claim must fail, because a living miner cannot be entitled to black lung benefits unless he is totally disabled based on pulmonary or respiratory impairments. Nonrespiratory and nonpulmonary impairments are irrelevant to establishing total disability for the purpose of entitlement to black lung benefits. 20 CFR § 718.204(a) (2004); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994); *Beatty v. Danri Corp*., 16 B.L.R. 1-11, 1-15 (1991), *aff'd*. 49 F.3d 993 (3d Cir. 1995). As will be discussed in detail below, the medical evidence filed in connection with his current claim does not establish that the Claimant has pneumoconiosis or any other pulmonary or respiratory impairment which is totally disabling. Thus I find that he has not established that a material change in conditions has occurred. It follows that I do not need to address the medical evidence in the record from his previous claims in explaining my decision that he is not entitled to benefits.

Medical Evidence

Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The following table summarizes the x-ray findings available in connection with the current claim.

The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 CFR § 718.102(b) (2004). Any such readings are therefore included in the "negative" column. One x-ray interpretation which made no reference to pneumoconiosis, positive or negative, given in connection with review of an x-ray film solely to determine its quality, is listed in the "silent" column.

Physicians' qualifications appear after their names. Qualifications have been obtained where shown in the record by curriculum vitae or other representations, or if not in the record, by judicial notice of the lists of readers issued by the National Institute of Occupational Safety and Health (NIOSH), and the registry of physicians' specialties maintained by the American Board

of Medical Specialties.[1] If no qualifications are noted for any of the following physicians, it means that either they have no special qualifications for reading x-rays, or I have been unable to ascertain their qualifications from the record, the NIOSH lists, or the Board of Medical Specialties. Qualifications of physicians are abbreviated as follows: A= NIOSH certified A-reader; B= NIOSH certified B-reader; BCR= board-certified in radiology. Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. See *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be radiologists.

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis	Silent as to the Presence of Pneumoconiosis
07/31/91	DX 16 Myers (A) 1/1		
08/12/91	DX 16 Anderson 1/1		
06/05/02		DX 14 Wicker (B)	Barrett (B, BCR) Read for quality only. Quality 1 = Good.
06/29/02		DX 15 Dahhan (B)	

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV). The following chart summarizes the results of the pulmonary function studies available in connection with the current claim. "Pre" and "post" refer to administration of bronchodilators. If only one figure appears,

[1]NIOSH is the federal government agency that certifies physicians for their knowledge of diagnosing pneumoconiosis by means of chest x-rays. Physicians are designated as "A" readers after completing a course in the interpretation of x-rays for pneumoconiosis. Physicians are designated as "B" readers after they have demonstrated expertise in interpreting x-rays for the existence of pneumoconiosis by passing an examination. Historical information about physician qualifications appears on the U.S. Department of Health and Human Services, List of NIOSH Approved B Readers with Inclusive Dates of Approval [as of] June 7, 2004, found at http://www.oalj.dol.gov/public/blalung/refrnc/bread3_07_04.htm. Current information about physician qualifications appears on the CDC/NIOSH, NIOSH Certified B Readers List found at http://www.cdc.gov/niosh/topics/chestradiography/breader-list.html. Information about physician board certifications appears on the web-site of the American Board of Medical Specialties, found at http://www.abms.org.

bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 CFR § 718.204(b)(2)(i) (2004).

Ex. No. Date Physician	Age Height	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
DX 16 07/31/91 Myers	51 68"	2.71 2.72	3.25 3.20	83% 85%	-- --	No No	Mild restrictive impairment
DX 16 08/12/91 Anderson	51 68.7"[2]	2.44	3.22	76%	99	No	Mild decrease in function
DX 15 06/29/02 Dahhan	67 66"	2.28 3243	2.96 3.10	77% 78%	75 90	No No	Mild partially reversible obstructive defect. Invalid test with >5% variability.
DX 14 07/22/02 Wicker	67 68"	2.26	2.78	81%	75.35	No	Mild reversible obstructive impairment

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (PO_2) and the percentage of carbon dioxide (PCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled. The following chart summarizes the arterial blood gas studies available in connection with his current claim. A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 CFR § 718.105(b) (2004).

[2] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116 (4th Cir. 1995). As there is a variance in the recorded height of the miner from 66" to 68.7", I have taken the average height (67.7") in determining whether the studies qualify to show disability under the regulations. None of the tests are qualifying to show disability whether considering the average height, or the heights listed by the persons who administered the testing.

Exhibit Number	Date	Physician	PCO_2 at rest/ exercise	PO_2 at rest/ exercise	Qualify?	Physician Impression
DX 15	07/13/02	Dahhan	39.7	81.4	No	Normal
DX 14	07/22/02	Wicker	43.4	77	No	Normal

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, whether the miner is totally disabled, and whether pneumoconiosis caused the miner's disability. A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 CFR §§ 718.202(a)(4) (2004). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 CFR § 718.202(a)(4) (2004). Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 CFR § 718.204(b)(2)(iv) (2004). With certain specified exceptions which do not apply here, the cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 CFR § 718.204(c)(2) (2004). The record contains the following medical opinions submitted in connection with the current claim.

On July 31, 1991, Dr. John E. Myers, Jr. examined Mr. Burke, apparently in connection with his claim for state workman's compensation benefits. DX 16. According to the American Board of Medical Specialties web-site (*see* note 1 above), Dr. Myers is board-certified in internal medicine. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, and pulmonary function testing. He reported 31 years of coal mine work, and a history of smoking ⅓ pack of cigarettes per day for the past eight years. On physical examination, he reported harsh breath sounds, with adequate air exchange. He read the x-ray as showing silicosis/coal workers' pneumoconiosis, category 1/1. The pulmonary function test showed only a mild restrictive defect and an electrocardiogram was within normal limits. Based upon his examination, Dr. Myers concluded that Mr. Burke was suffering from coal worker's pneumoconiosis and chronic obstructive pulmonary disease. Dr. Myers found that Mr. Burke had a Class II impairment under the AMA Guidelines based on his pulmonary function testing, but said that he was unable to determine whether the miner had the respiratory capacity to perform his previous coal mine employment because further investigation into the source of the respiratory symptoms was needed. He said that the symptoms could be the result of the

cardiovascular system and he was unable to determine whether the miner could return to work based on the information before him.

On August 12, 1991, Dr. William Anderson examined Mr. Burke, also in connection with his claim for state workman's compensation benefits. DX 16. Dr. Anderson is board-certified in internal medicine and pulmonary disease. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, and pulmonary function testing. He recorded 32 years of coal mine work, and a smoking history of a pack per week since age 25. On physical examination, he observed some expiratory rales in the left base of the lungs, which were otherwise clear. He read the x-ray as showing category 1/1 pneumoconiosis. The pulmonary function test showed a mild decrease in pulmonary function, and an electrocardiogram showed changes of left ventricular hypertrophy. Dr. Anderson concluded that the miner has category 1/1 pneumoconiosis, mild decrease in pulmonary function and symptoms of cardiovascular disease. He found that Mr. Burke had only a mild impairment in function based on his lungs, and that he retained the respiratory capacity to perform his last job in the mines.

Dr. A. Dahhan examined Mr. Burke on behalf of the Employer on June 29, 2002. DX 15. Dr. Dahhan is board-certified in internal medicine and pulmonary disease, and a B-reader. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, blood gas studies and pulmonary function testing. He reported 33 years of coal mine work, and a smoking history of one pack per day for four years. Examination of the chest showed good air entry to both lungs with no crepitation, rhonchi or wheeze. He read the x-ray as showing no evidence of pneumoconiosis. The pulmonary function test showed a reversible obstructive defect, although the physician noted that the testing did not meet the criteria for validity due to a greater than 5% variation among the curves. The arterial blood gas study was normal. An electrocardiogram showed normal sinus rhythm with evidence of left ventricular hyper atrophy. Dr. Dahhan concluded that there was no evidence of pneumoconiosis or any pulmonary disability due to coal dust exposure. In his opinion, there was no evidence of the disease based on normal clinical examination, clear chest x-ray, normal arterial blood gas study results and only a mild reversible obstructive defect on the pulmonary function study. Dr. Dahhan found that Mr. Burke had only a mild reversible impairment in function based on his lungs, and that he retained the respiratory capacity to perform his last job in the mines.

On July 22, 2002, Dr. Mitchell Wicker examined Mr. Burke on behalf of the Department of Labor. DX 14. Dr. Wicker is board-certified in internal medicine, and a B-reader. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, blood gas studies and pulmonary function testing. He reported coal mine employment from 1971 to 1975, and 1988 to 1991. He reported one year of smoking, stopped in 1956. He read the x-ray as showing no evidence of pneumoconiosis. The pulmonary function test showed a mild reversible obstructive impairment. The arterial blood gas study was normal. Based upon his examination and testing, Dr. Wicker concluded that Mr. Burke was not suffering from coal worker's pneumoconiosis as there was no evidence of the disease. Dr. Wicker found that Mr. Burke had no pulmonary impairment and retained the respiratory capacity to perform his last job in the mines or comparable work in a dust-free environment.

Existence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 CFR § 718.201 (2004). In this case, Mr. Burke's medical records indicate that he has been diagnosed with chronic obstructive pulmonary disease, which can be encompassed within the definition of legal pneumoconiosis. Ibid.; *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co*., 60 F.3d 173 (4th Cir. 1995). However, only chronic obstructive pulmonary disease caused by coal dust constitutes legal pneumoconiosis. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 515 (6th Cir. 2003).

20 CFR § 718.202(a) (2004) provides that a finding of the existence of pneumoconiosis may be based on (1) chest x-ray, (2) biopsy or autopsy, (3) application of the presumptions described in Sections 718.304 (irrebuttable presumption of total disability due to pneumoconiosis if there is a showing of complicated pneumoconiosis), 718.305 (not applicable to claims filed after January 1, 1982) or 718.306 (applicable only to deceased miners), or (4) a physician exercising sound medical judgment based on objective medical evidence and supported by a

reasoned medical opinion. There is no evidence that Mr. Burke has had a lung biopsy, and, of course, no autopsy has been performed. None of the presumptions apply, because the evidence does not establish the existence of complicated pneumoconiosis, Mr. Burke filed his claim after January 1, 1982, and he is still living. In order to determine whether the evidence establishes the existence of pneumoconiosis, therefore, I must consider the chest x-rays and medical opinions. As this claim is governed by the law of the Sixth Circuit, the Claimant may establish the existence of pneumoconiosis under any one of the alternate methods set forth at Section 202(a). *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 575 (6th Cir. 2000); *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (*en banc*).

Pneumoconiosis is a progressive and irreversible disease. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314-315 (3rd Cir. 1995); *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 803 (4th Cir. 1998); *Woodward v. Director, OWCP*, 991 F.2d 314, 320 (6th Cir. 1993). As a general rule, therefore, more weight is given to the most recent evidence. See *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 151-152 (1987); *Eastern Associated Coal Corp. v. Director, OWCP*, 220 F.3d 250, 258-259 (4th Cir. 2000); *Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 1167 (6th Cir. 1997); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 602 (3rd Cir. 1989); *Stanford v. Director, OWCP*, 7 B.L.R. 1-541, 1-543 (1984); *Tokarcik v. Consolidated Coal Co*., 6 B.L.R. 1-666, 1-668 (1983); *Call v. Director, OWCP*, 2 B.L.R. 1-146, 1-148-1-149 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Woodward*, 991 F.2d at 319-320; *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992); *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-600 (1984).

Of the four available x-rays in this case, two have been read by reviewers to be positive for pneumoconiosis, and two to be negative. For cases with conflicting x-ray evidence, the regulations specifically provide,

> Where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

20 CFR § 718.202(a)(1) (2004); *Dixon v. North Camp Coal Co*., 8 B.L.R. 1-344 (1985); *Melnick v. Consolidation Coal Co*., 16 B.L.R. 1-31, 1-37 (1991). Readers who are board-certified radiologists and/or B-readers are classified as the most qualified.

An x-ray taken on July 31, 1991 was read as positive for pneumoconiosis by Dr. Myers, an A reader, and an x-ray taken on August 12, 1991 was interpreted as positive by Dr. Anderson, who had no particular qualifications for reading x-rays. However, the District Director noted in his decision that these two x-ray readings could not be considered in this claim pursuant to 20 C.F.R. 718.102(d), because the original x-rays were not submitted to the his office as required under the Act. The Employer did not object to their admission at the hearing, but in any event, even if they are considered, they are not sufficient to overcome the negative readings of more recent x-rays by B readers, as the B readers are better qualified, and pneumoconiosis is a progressive disease, so the later x-rays would be more probative of the miner's condition.

The remaining two x-rays were interpreted only as negative for the disease. Dr. Wicker interpreted a June 5, 2002 film as negative, and Dr. Dahhan interpreted a June 29, 2002 film as negative for pneumoconiosis. Both physicians are B-readers. Therefore, I find that the weight of the x-ray evidence is negative for the disease.

I must next consider the medical opinions. The Claimant can establish that he suffers from pneumoconiosis by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co*., 8 B.L.R. 1-65, 1-66 (1985); *Hess v. Clinchfield Coal Co*., 7 B.L.R. 1-295, 1-296 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127, 1-1129 (1984). A "reasoned" opinion is one in which the judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields*, above. Whether a medical report is sufficiently documented and reasoned is for the judge to decide as the finder-of-fact; an unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149, 1-155 (1989) (en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp*., 6 B.L.R. 1-1291, 1-1294 (1984). A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies Coal Co*., 6 B.L.R. 1-1182, 1-1184 (1984). An opinion may be given little weight if it is equivocal or vague. *Griffith v. Director, OWCP*, 49 F.3d 184, 186-187 (6th Cir. 1995); *Justice v. Island Creek Coal Co*., 11 B.L.R. 1-91, 1-94 (1988); *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236, 1-239 (1984).

The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-599 (1984). More weight may be accorded to the conclusions of a treating physician as he or she is more likely to be familiar with the miner's condition than a physician who examines him episodically. *Onderko v. Director, OWC*P, 14 B.L.R. 1-2, 1-6 (1989). In this case, however, Mr. Burke identified Dr. Mohammed in Morehead as his current treating physician for his lungs. However, the record does not contain any records or reports from this physician.

In 1991, Dr. Myers diagnosed Mr. Burke with pneumoconiosis and chronic obstructive pulmonary disease. Dr. Anderson also diagnosed Mr. Burke with pneumoconiosis in 1991. Over ten years later, Drs. Dahhan and Wicker examined Mr. Burke and offered opinions on the existence of the disease. Dr. Dahhan determined that the miner does not have pneumoconiosis, not any type of disability due to pneumoconiosis. Dr. Wicker also expressed an opinion that the miner does not have pneumoconiosis as the medical evidence did not provide any evidence of the disease.

The conflicting medical opinions must be weighed to resolve the contrary conclusions. All of the physicians who provided medical opinions did so based on adequate underlying documentation. All provided at least some rationale in support of their conclusions. Thus I consider all of these medical opinions to represent documented and reasoned medical opinions.

After weighing all of the medical opinions of record, I resolve this conflict by according greater probative weight to the opinions of Drs. Dahhan and Wicker. Both possess excellent credentials in the field of pulmonary disease. I also find their reasoning and explanation in support of their conclusions more complete and thorough than that provided by the physicians who concluded that the Claimant was suffering from pneumoconiosis. Drs. Dahhan and Wicker better explained how all of the evidence they developed and reviewed supported their conclusions. I also find the opinions of Drs. Dahhan and Wicker to be in better accord both with the evidence underlying their opinions and the overall weight of the medical evidence of record. Finally, I find that both Dr. Dahhan and Dr. Wicker had the opportunity to examine Mr. Burke and provide the most recent reports of his condition. In light of the progressive nature of pneumoconiosis, I find their reports entitled to more weight due to the fact that they examined the Claimant more than ten years after the other two physicians of record.

In sum, I do not discredit any of the medical opinions of record. In resolving the conflict presented by the physicians of record, however, I find the opinions of Drs. Dahhan and Wicker to merit greater probative weight. These credible and well reasoned medical opinions are convincing for purposes of establishing that the Claimant does not have pneumoconiosis or any other respiratory or pulmonary impairment arising out of coal mine work. This evidence out-weighs the contrary conclusions provided by Drs. Myers and Anderson. I conclude, therefore, that the weight of the medical opinions of record fails to establish that the Claimant has pneumoconiosis as the Act requires for entitlement to benefits.

Total Pulmonary or Respiratory Disability

Even had Mr. Burke established that he has pneumoconiosis, he would only be entitled to benefits if he were totally disabled by it. A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 CFR § 718.304 (2004), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f), 20 CFR § 718.204(b) and (c) (2004). The regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 CFR § 718.204(b) and (d) (2004). Lay testimony may only be used in establishing total disability in cases involving deceased miners, and in a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 CFR § 718.204(d) (2004); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994). There is no evidence in the record that Mr. Burke suffers from complicated pneumoconiosis or cor pulmonale. Thus I will consider pulmonary function studies, blood gas studies and medical opinions. In the absence of contrary probative evidence, evidence from any of these categories may establish disability. If there is contrary evidence, however, I must weigh all the evidence in reaching a determination whether disability has been established. 20 CFR § 718.204(b)(2) (2004); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986).

In this case, the evidence is heavily weighted against a finding of pulmonary or respiratory disability. There are no pulmonary function or arterial blood gas studies with results qualifying for total disability. Nor are there any doctors' opinions stating unequivocally that Mr. Burke is totally disabled by a pulmonary condition. Dr. Myers was uncertain whether Mr. Burke could return to work, and uncertain as to the cause of any impairment. Dr. Anderson, Dr. Dahhan and Dr. Wicker, on the other hand, all found only a mild or no impairment, and all were of the opinion that Mr. Burke retained the respiratory capacity to perform his last job in the mines. Although Mr. Burke has testified that his activities are severely limited based on his shortness of breath, there are many possible causes of such a symptom, and I cannot base a finding of disability solely on his testimony. I find that the opinions of Drs. Anderson, Dahhan and Wicker, that Mr. Burke does not have a pulmonary or respiratory disability, are consistent with the weight of the medical evidence as a whole, including the pulmonary function and arterial blood gas studies. Thus I conclude that he has failed to establish that he is totally disabled by a pulmonary or respiratory impairment. Because the Claimant has not established either that he has pneumoconiosis, or that he is totally disabled by a pulmonary or respiratory impairment, he cannot establish any of the essential elements for entitlement to benefits.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

Because Mr. Burke has failed to establish either that he has pneumoconiosis, or that he is totally disabled by a pulmonary or respiratory impairment, he cannot establish that there has been a change in one of the applicable conditions of entitlement since the denial of his previous claim became final. He is not entitled to benefits under the Act.

ATTORNEY FEES

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 30 U.S.C. § 932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

The claim for benefits filed by Everett Burke on February 6, 2002, is hereby DENIED.

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ALICE M. CRAFT
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 725.481 (2004), any party dissatisfied with this decision and order may appeal it to the Benefits Review Board within 30 days from the date of this decision and order, by filing a notice of appeal with the Benefits Review Board at

P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Ave., NW, Washington, D.C. 20210.